

Caribbean Divorce for Americans: Useful Alternative or Obsolescent Institution

James A. Fulton

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>



Part of the [Law Commons](#)

Recommended Citation

Fulton, James A. (1976) "Caribbean Divorce for Americans: Useful Alternative or Obsolescent Institution," *Cornell International Law Journal*: Vol. 10: Iss. 1, Article 4.

Available at: <http://scholarship.law.cornell.edu/cilj/vol10/iss1/4>

This Note is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CARIBBEAN DIVORCE FOR AMERICANS: USEFUL ALTERNATIVE OR OBSOLESCE INSTITUTE?

Restrictive American divorce laws have long made the liberal grounds available in foreign countries an attractive solution for American divorce-seekers.¹ The availability and desirability of foreign divorce has, however, been affected in recent years by various developments in this country and abroad. Mexico, once the acknowledged haven for disenfranchised couples,² in 1971 abruptly terminated its generous policy of accommodating United States citizens.³ Within four months, two small Caribbean nations, Haiti and the Dominican Republic, liberalized their statutes to capitalize on the thirsting American demand for easy divorces,⁴ and shortly thereafter each country was dissolving approximately one hundred American marriages per month.⁵ At the same time

1. See Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. FAM. L. 267, 282-83 (1971); Comment, *Mexican Bilateral Divorce—A Catalyst in Divorce Jurisdiction Theory?*, 61 NW. U.L. REV. 584, 584-85 (1966). See also Berke, *Mexican Divorces*, 7 PRAC. LAW. 84 (No. 3, Mar. 1961).

2. Note, *Isle of Hispaniola: American Divorce Haven?*, 5 CASE W. RES. J. INT'L L. 198, n.2 (1973):

Divorce was reportedly a \$50 million-a-year business in Mexico that drew some 18,000 Americans annually. N.Y. Times, Feb. 13, 1972, § 10, at 1, col. 1.

Another commentator has reported an estimate that "anywhere from ten to thirty thousand New Yorkers a year ended their marriages in Mexico." M. WHEELER, *NO-FAULT DIVORCE* 164 (1974).

3. The Mexican Law Digest of 6 MARTINDALE-HUBBELL LAW DIRECTORY 3660 (1976) notes:

Decree of Feb. 8, 1971 amends Art. 35 of Nationality and Naturalization Law which now provides that no judicial or administrative authority shall grant divorce to aliens unless a certificate issued by ministry of the Interior (Gobernacion) stating parties have legal residence in country and their legal immigration status permits them to petition for divorce in Mexico, is filed with court.

Article 35 now requires six months' residence before a noncitizen can petition for divorce. *Isle of Hispaniola*, *supra* note 2, at 198.

4. O'Neil, *City Issuing Marriage Licenses to Parties in Caribbean Divorces*, 166 N.Y.L.J., Nov. 3, 1971, at 1, col. 7:

The Republic of Haiti amended its divorce laws by a law published June 28. The Dominican Republic, over the veto of its president, enacted similar liberalization on June 4, 1971. The actions followed a tightening of Mexico's divorce laws in March.

WHEELER, *supra* note 2, at 166 states:

Two countries on the Caribbean island of Hispanola [sic], Haiti and the Dominican Republic, quickly jumped into the vacuum Mexico had left. Both were careful to pattern their laws after the old Mexican statute . . .

5. *Divorce, Caribbean Style: Quickie Divorces*, TIME, Aug. 30, 1971, at 43.

that Latin America was undergoing these legislative changes, a conspicuous divorce reform movement was underway in the United States. Once a model of marital conservatism, the American legislative pattern by 1974 reflected "a mosaic of no-fault divorce."⁶

Finding the ideal divorce forum can be problematic for those desiring to terminate their marriage. For some, a prompt disposition is of the utmost importance. For others, avoiding the embarrassment and stigma of publicity is a prime concern. Some couples may be unable to obtain a local decree due to weak grounds or insufficient evidence. Still others search for the least expensive divorce.

The purpose of this Note is to determine whether the adoption of modern American no-fault divorce grounds can meet the needs of United States citizens who might otherwise terminate their marriages in a foreign country.⁷ American no-fault legislation and Caribbean divorce law are compared with respect to five major variables—grounds for dissolution, required evidentiary showing, speed of court process, monetary costs, and avoidance of publicity. Prospects for recognition and validity of Caribbean decrees in each of the fifty states, the District of Columbia, the Virgin Islands, and Puerto Rico are evaluated. The analysis seeks to identify which, if any, of the Caribbean advantages remain, and attempts to assess whether the American divorce-seeker is truly better off staying at home.

I

COMPARISON OF DOMINICAN, HAITIAN, AND U.S. DIVORCE

A. GROUNDS FOR DIVORCE

Of the jurisdictions examined herein, the Dominican Republic has adopted by far the most liberal grounds for divorce. The mutual consent

6. Foster & Freed, *Family Law*, 25 SYRACUSE L. REV. 401 (1974).

7. The foreign divorce trade has been problematic due to other reasons as well. For its American consumer, the legal recognition accorded to his foreign divorce is dependent on the circumstances of each case and the jurisdiction in which a challenge is initiated. See *generally* Annot., 13 A.L.R.3d 1419 (1967). To the attorney, recommending the foreign decree may lead to disciplinary action by the bar for breach of ethical standards. See *e.g.*, *In re Anonymous*, 274 App.Div. 289, 80 N.Y.S.2d 75 (1st Dept. 1948), which maintained that advising clients to seek foreign decrees, with knowledge that the state will not grant comity, "will be deemed sufficient basis for appropriate disciplinary action." For consumers and practitioners alike, the need for the foreign trade has promoted the rise of travel companies and tourist agencies which defraud the public and feed on the urgency of foreign divorce-seekers for their livelihood. See *Kugler v. Haitian Tours, Inc.*, 120 N.J. Super. 260, 293 A.2d 706 (Ch. Div. 1972), in which a tour company which sold "travel packages" with the purpose of obtaining Haitian divorces was found guilty of violation of the State's Consumer Fraud Act.

of both parties to terminate the marriage is a sufficient basis for the court to grant a decree.⁸ This consent is usually manifested to the Dominican court by the physical presence of one party and the representation of the other through an attorney.⁹

Similarly, Article 220 of the Haitian code lists "the mutual and steady consent of the spouses"¹⁰ as an actionable ground for divorce. However, narrow restriction and close regulation of this ground by Haitian courts have precluded its use by United States citizens.¹¹ In fact, the judicial tendency to make painstaking investigations into the veracity and nature of the alleged consent renders this ground unattractive to native Caribbeans as well.¹² In addition, statutory requirements as to age and length of marriage plus a forced period of attempted reconciliation make mutual consent unavailable for Americans desiring a "quickie" divorce.¹³ Due to the problems inherent in obtaining dissolutions by mutual consent, most Americans seek divorce in Haiti on the ground of

8. 6 MARTINDALE-HUBBELL LAW DIRECTORY 3368 (1976); Forscher, *Haitian, Dominican Laws of Divorce Evaluated (Part 1)*, 166 N.Y.L.J., Oct. 19, 1971, at 4, col. 3, cites Article I, Paragraph V of Dominican Law No. 142, enacted on June 4, 1971:

Foreigners who are in this country, although not residents, can be divorced by mutual consent, providing, however, that at least one of the parties must be physically present, and the other represented by a special attorney in fact.

9. Forscher, *supra* note 8, at 4, col. 3.

10. *Id.*, citing the Haitian code:

Art. 220—The mutual and steady consent of the spouses expressed as prescribed by law, under the conditions and after the trials that it prescribes, will prove sufficiently that the conjugal life is insupportable and that it exists, in regard to them, a peremptory ground for divorce.

11. Forscher, *Haitian, Dominican Laws of Divorce Evaluated (Part 2)*, Oct. 20, 1971, at 4, col. 2, writes:

As a practical measure, no foreigner can secure a divorce in Haiti upon the ground of mutual consent. Indeed, the ground of mutual consent is rarely employed, even by Haitians, and even more rarely granted. It appears that the Haitian courts take the utmost pains and conduct the most protracted investigation to establish that the consent is not only both "mutual and steady," but also that the proof thereof is sufficient to establish "that the conjugal life is insupportable," all of which requirements are contained in article 220 of the Haitian law [footnote omitted].

12. *Id.*

13. *Isle of Hispaniola, supra* note 2, at 202 states:

Mutual consent for both native and foreign parties, is only available if the male is at least twenty-five years old and the female is between the ages of twenty-one and forty-five. The parties must have been married at least two years but not over twenty. To these age and duration requirements the court has initiated a protracted waiting period of at least fifteen months with court sponsored attempts at reconciliation during that period. This procedure makes divorce by mutual consent in Haiti a rather rigorous exercise and impracticable for Americans seeking a Mexican-style divorce.

"incompatibility of character."¹⁴ This ground, closely akin to American no-fault requirements, was enacted solely for the benefit of foreign tourists.¹⁵

Unlike the Dominican Republic, no American jurisdiction to date will grant a divorce solely on the ground of mutual consent.¹⁶ Among the no-fault grounds available in the United States are "incompatibility" and "irreconcilable differences." Statutory definitions of these concepts indicate their practical equivalence. Incompatibility, recognized as a legitimate ground for divorce in six American states,¹⁷ "may be broadly defined as such a deep and irreconcilable conflict in the personalities or temperaments of the parties as makes it impossible for them to continue a normal marital relationship."¹⁸ "Irreconcilable differences" or "irretrievable breakdown," first recognized as a basis for dissolution in California¹⁹ and now followed in twenty-six jurisdictions,²⁰ have been defined as:

14. Forscher, *supra* note 8, at 4, col. 3, cites the pertinent portions of the new Haitian divorce code enacted June 28, 1971:

Article I. The grounds for divorce for tourists, visiting persons and residing aliens remain the same as those prescribed by articles 215, 216, 217, 218, 219 and 220 of the Civil Code. Nevertheless, if the spouses have ceased to live together and a separation of bed and board between them has lasted one year, this shall be grounds for divorce. Incompatibility of Character shall also constitute grounds for divorce.

Incompatibility was similarly the basis for practically all of the Mexican quickie divorces prior to their extinction in 1971. *Id.* at 4, col. 1.

15. *Id.* at 4, col. 1.

16. R. KAHN & L. KAHN, *THE DIVORCE LAWYERS' CASEBOOK* 115 (1972) notes that despite the march of no-fault reform, the American legal system "does not treat the marriage contract so lightly as to permit 'consent' divorces or divorce by mutual agreement."

17. ALA. CODE ANN., tit. 34, §§ 20-22 (Supp. 1974); ALASKA STAT. ANN. § 09.55.110 (Michie 1975); KAN. STAT. ANN. § 60-1601 (Supp. 1975); NEV. REV. STAT. § 125.010 (1975); N.M. STAT. ANN. § 22-7-1 (Supp. 1975); OKLA. STAT. ANN. tit. 12, § 1271 (1961).

18. Annot., 58 A.L.R.2d 1218, 1219 (1958).

19. Comment, *New York Conciliation and Divorce*, 37 ALB. L. REV. 751, 759 (1973), citing CAL. CIV. CODE ANN. § 4506 (Deering 1972).

20. ARIZ. REV. STAT. ANN. § 25-312 (Supp. 1973); CAL. CIV. CODE ANN. § 4508 (West Supp. 1976); COLO. REV. STAT. § 14-10-106 (1973); GEN. STAT. CONN. § 46-32 (1975); DEL. CODE ANN. tit. 13, § 1505 (Supp. 1975); FLA. STAT. ANN. § 61.052 (Supp. 1976); GA. CODE ANN. § 30.102 (Supp. 1975); HAWAII REV. STAT. § 580-41 (Supp. 1975); IDAHO CODE § 32-603 (Supp. 1975); IND. STAT. ANN. § 31-1-11.5-3 (Supp. 1976); IOWA CODE ANN. § 598.17 (Supp. 1976); KY. REV. STAT. ANN. § 403.140 (1973); ME. REV. STAT. ANN. tit. 19, § 691 (Supp. 1975); MASS. ANN. LAWS ch. 208, § 1 (Supp. 1976); MICH. STAT. ANN. § 25.86 (1974); MINN. STAT. ANN. § 518.06 (Supp. 1975); MO. REV. STAT. § 452.305 (Supp. 1976); MONT. REV. CODES ANN. § 48-316 (Supp. 1975); NEB. REV. STAT. ANN. § 42-361 (1974); N.D. CENT. CODE § 14-05-03 (1971); N.H. REV. STAT. ANN. § 458.7-a (Supp. 1975); ORE. REV. STAT. § 107.025 (1975); R.I. GEN. LAWS ANN. § 15-5-3.1 (Supp. 1975); TEX. FAM. CODE § 3.01 (1975); V.I. CODE ANN., tit. 16, § 104 (Supp. 1975); WASH. REV. CODE ANN. § 26.09.030 (Supp. 1975).

Those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved.²¹

The remaining twenty-one American jurisdictions have either retained only traditional fault grounds for divorce such as adultery, cruelty, or abandonment,²² acknowledged insanity as a legitimate no-fault ground,²³ or granted no-fault dissolutions after the parties have lived apart for some statutory period.²⁴

By comparing the grounds for divorce in the countries under consideration several conclusions are apparent. The grounds in the Dominican Republic are clearly the most convenient. Dominican divorces are essentially *groundless*; plaintiff and defendant need only jointly ask the court to dissolve their marriage. No allegations of fault or incompatibility, irreconcilable differences, or irretrievable breakdown are required. Haiti, on the other hand, in enacting incompatibility as its basis for foreign divorce, offers grounds which are no more advantageous than those available to citizens in the thirty-two American no-fault jurisdictions. Only residents of the remaining twenty-one dominions (where fault concepts, insanity, or living apart are the recognized grounds) would find the Haitian legislation more sympathetic and expeditious. Couples in these latter jurisdictions could certainly obtain a no-fault divorce in the Caribbean with less delay than in an alternative liberal American state, where residency requirements of many weeks to many months are stringently enforced.²⁵

B. THE EVIDENTIARY SHOWING

It is self-evident that parties to a Dominican bilateral divorce need

21. CAL. CIV. CODE ANN. § 4507 (West Supp. 1976).

22. ILL. ANN. STAT. ch. 40, § 1 (1976).

23. MD. ANN. CODE art. 16, §§ 24, 26 (Supp. 1975); MISS. CODE ANN. § 2735 (Supp. 1972); N.C. GEN. STAT. ANN. §§ 50-5, 50-6 (Supp. 1973); PA. STAT. ANN. tit. 23, § 10 (Purdon 1955); VT. REV. STAT. ANN., tit. 15, §§ 551, 631 (Supp. 1974); W. VA. CODE ANN. § 48-2-4 (Supp. 1975); WYO. STAT. ANN. § 20-38 (1959).

24. ARK. STAT. ANN. § 34-1202 (Supp. 1973); MD. ANN. CODE art. 16, §§ 24, 26 (Supp. 1975); N.J. STAT. ANN. § 2A:34-2 (Supp. 1975); N.Y. DOM. REL. LAW, § 170 (McKinney 1964); N.C. GEN. STAT. ANN. §§ 50-5, 50-6 (Supp. 1973); OHIO REV. CODE ANN. § 3105.01 (Supp. 1974); P.R. LAWS ANN., tit. 31, § 321 (1967); S.C. CODE ANN. § 20-101 (Supp. 1973); TENN. CODE ANN. §§ 36-801, 36-802 (1974); UTAH CODE ANN. §§ 30-3-1, 30-3-2 (Replacement Vol. 3, Supp. 1975); VT. REV. STAT. ANN. tit. 15, §§ 551, 631 (Supp. 1974); VA. CODE ANN. § 20-91 (Replacement Vol. 1975); W. VA. CODE ANN., § 48-2-4 (Supp. 1975); WIS. STAT. ANN. § 247.07 (Supp. 1975); WYO. STAT. ANN. § 20-38 (1959).

25. WHEELER, *supra* note 2, at 157. See Foster & Freed, *Durational Residency Requirements as Prerequisites for Divorce Jurisdiction*, 9 FAM. L. Q. 555 (1975) for a complete listing of residency requirements in American jurisdictions.

make no affirmative evidentiary showing to receive a divorce. If both parties are represented before the court the decree of dissolution *must be granted*.²⁶ Consequently, Dominican hearings tend to be "very brief and purely pro-forma."²⁷

The evidentiary requirements in Haitian proceedings have been the subject of some misconceptions. Since the grounds for divorce adopted in Haiti were virtually identical to the old Mexican grounds, an observer might presume that Haitian divorce proceedings, like their Mexican predecessors, are mere rubber-stamp dispositions.²⁸ This is not the case by any means.²⁹ A Haitian judge is obligated to ascertain the likelihood of a reconciliation, and can only docket the case when he is convinced that reconciliation cannot be accomplished.³⁰ Once this finding has been made, the court, through its own questioning, conducts an extensive inquiry into the alleged grounds.³¹ The Haitian tribunal has the authority to compel the plaintiff to be present,³² although it cannot require testimony of an independent witness.³³

Similar to Haitian practice, American no-fault law demands a substantive affirmative showing. American appellate courts have repeatedly emphasized that a "no-fault" divorce is not a "no-grounds" divorce. Where grounds of incompatibility are asserted, the mere mutual request of the parties will not serve to dissolve the marriage. Rather, the court must be satisfied from factual evidence demonstrating the degree of incompatibility "that the parties can no longer live together."³⁴ In the course of the hearing, the court is required to examine the personalities and dispositions of the parties, their conduct within the marriage, the reasons for the alleged incompatible situation, and the issue of whether such situation results from volition, predisposition, or inherent deficiency.³⁵ It must weigh the need for the divorce against the possibilities of adjustment and reconciliation.³⁶ Only after presentation and careful

26. 6 MARTINDALE-HUBBELL LAW DIRECTORY 3368 (1976).

27. Forscher, *supra* note 8, at 4, col. 3.

28. *Isle of Hispaniola*, *supra* note 2, at 202 assumes that "incompatibility is basically a procedural step both in Mexico and Haiti."

29. Forscher, *supra* note 11, at 4, col. 2.

30. *Id.*

31. *Id.*

32. Forscher, *supra* note 8, at 4, col. 1.

33. *Id.* at 4, col. 2.

34. *Chavez v. Chavez*, 39 N.M. 480, 493, 50 P.2d 264, 272 (1935) [emphasis omitted]. See also *Burch v. Burch*, 195 F.2d 799 (3d Cir. 1952).

35. *Shearer v. Shearer*, 356 F.2d 391, 393 (3d Cir. 1965), *cert. denied*, 384 U.S. 940 (1966).

36. *Id.*

evaluation of all available evidence can an American court grant the decree.

The process is the same in states which grant divorces for irreconcilable differences or irretrievable breakdown. In one court's opinion:

We do not view the matter of dissolution as being such a simple, unilateral matter of one mate simply saying "I want out." All of the surrounding facts and circumstances are to be inquired into to arrive at the conclusion as to whether or not indeed the marriage has reached the terminal stage based upon facts which must be shown. Even in uncontested dissolutions, the court would properly make inquiry to determine this fact³⁷

The state of California has been instrumental in developing this area of no-fault policy. The leading case of *In re Marriage of McKim*³⁸ involved a plea for a bilateral consent divorce on the basis of irreconcilable differences in which the plaintiff wife failed to be present at trial. The husband offered uncontradicted testimony as to the existence of these differences. Denying the decree, the Supreme Court of California remanded the case for further proceedings consistent with the following reasoning:

Although the Legislature intended that as far as possible dissolution proceedings should be nonadversary, eliminating acrimony, it did not intend that findings of the existence of irreconcilable differences be made perfunctorily. It rejected a proposal under which the court could have been required to dissolve a marriage on a showing that the parties had taken certain procedural steps and that a certain period of time had passed. Instead the Family Law Act contemplates that "The court should sit as an overseeing participant to do its utmost to effect a healing of the marital wounds" The court cannot perform this contemplated function without evidence as to the condition of the marriage.³⁹

The court refused to promulgate specific procedures to secure the required evidence at the hearing, but it endorsed the normal trial court policy of ordering the plaintiff to appear and testify.⁴⁰ Further, it upheld the judicial policy of requiring the testimony of other competent witnesses in exceptional cases.⁴¹ A number of American jurisdictions demand as a matter of practice the corroboration of no-fault claims by an impartial third-party witness.⁴²

37. *Ryan v. Ryan*, 277 So. 2d 266, 271 (Fla. 1973).

38. 6 Cal. 3d 673, 493 P.2d 868, 100 Cal. Rptr. 140 (1972).

39. *Id.* at 679, 493 P.2d at 871, 100 Cal. Rptr. at 143.

40. *Id.* at 681, 493 P.2d at 872-73, 100 Cal. Rptr. at 144-45.

41. *Id.* at 682, 493 P.2d at 874, 100 Cal. Rptr. at 146.

42. See M. MAYER, *DIVORCE AND ANNULMENT IN THE 50 STATES* 27, 56 (2d ed. 1971);

Theoretically, the evidentiary showing in the United States is more demanding than that required in the Caribbean. However, a survey of the evidence required in practice indicates that divorce grounds in some American courts are no more difficult to prove than in the Caribbean forums. As one commentator has stated, "[T]he nature of the judge's actual pattern of behavior is somewhat different than its theoretical counterpart."⁴³ For example, a significant number of attorneys have acknowledged that perjury is rampant in American divorce proceedings.⁴⁴ Allegations are often fabricated, and decrees are rarely denied.⁴⁵ It may be that adoption of more liberal divorce standards has lessened the need for perjury; but it is equally true that the simpler the grounds become, the easier it is to manufacture them.

Technically, no American jurisdiction has gone as far as the Dominican Republic by establishing mutual consent as a basis for dissolution. But in actuality, it may be as effortless to contrive a divorce in the United States as it is to request one in Santo Domingo.

Despite the harsh rules aimed at collusion, connivance, and the like, and despite the basic theory that marriage is a sacred institution with the state holding a participating interest, the vast majority of divorces and annulments are by mutual consent and mutual action. This statement flies in the face of religious attitudes, judicial platitudes, and legislative intent, but it must be recognized as fact. Most divorces are uncontested, which means that the defendant makes only a *pro-forma* defense, if any. The evidence heard is one-sided and highly partisan (if not worse than that), and what is supposed to be an adversary proceeding becomes merely a ratification of private decisions previously made.⁴⁶

In theory, Haitian and American courts, unlike their Dominican counterparts, demand an elaborate evidentiary showing of the alleged grounds for divorce. The Haitian requirement is less stringent than that of some United States courts which will order a separate witness's presence before the court. However, when actual American practice is examined, it appears that the factual showing required of divorce-seekers by some judges will often be less than substantial.

C. SPEED OF COURT PROCESS

The couple whose marriage has broken down irreparably will often

Schulman, *Incompatibility: A "New" Approach to the Dissolution of Marriage*, 20 KAN. L. REV. 227, 235 (1970). See also S. ROSENBLATT, *THE DIVORCE RACKET* 23 (1969).

43. Walker, *supra* note 1, at 284.

44. WHEELER, *supra* note 2, at 5.

45. Walker, *supra* note 1, at 284-85.

46. MAYER, *supra* note 42, at 56.

desire a divorce as soon as possible. In terms of promptness, the Caribbean courts offer a clear advantage over American jurisdictions. Dominican officials have announced that foreigners must wait no more than 72 hours for access to the courts.⁴⁷ In Haiti, once clerical procedures are complied with, a hearing is granted and the decree is handed down within three days.⁴⁸

In contrast, an American divorce may require months of arduous waiting. Of the thirty-two jurisdictions which have adopted incompatibility, irreconcilable differences, or irretrievable breakdown as grounds for dissolution, two have enacted compulsory conciliation statutes requiring the parties to submit to a period of counseling before the court will entertain divorce proceedings.⁴⁹ In thirteen other states, the courts in their discretion *may* require conciliation proceedings prior to adjudication;⁵⁰ the exercise of this choice will vary from case to case. In addition to compelling conciliation proceedings, a number of states require a "waiting period" before a final divorce decree may be entered.⁵¹ In those states which have no authority to demand conciliation proceedings or waiting periods, court congestion by itself can delay the process tediously.⁵²

D. COST: DOLLARS AND CENTS

The out-of-pocket burdens of procuring a Caribbean divorce can easily deceive the American consumer. Legal costs for obtaining an American divorce vary from state to state, and the average may range from \$450 to \$1,000.⁵³ A Caribbean dissolution will only cost from \$300 to

47. *Isle of Hispaniola*, *supra* note 2, at 203.

48. Forscher, *supra* note 8, at 4, col. 2.

49. IOWA CODE ANN. § 598.16 (Supp. 1975); ME. REV. STAT. ANN. tit. 19, § 691 (Supp. 1975).

50. ARIZ. REV. STAT. ANN. § 25-381.05 (Supp. 1973); FLA. STAT. ANN. § 61.052 (Supp. 1975); IDAHO CODE § 32-716 (Supp. 1975); IND. STAT. ANN. § 31-1-11.5-8 (Supp. 1975); KAN. STAT. ANN. § 60-1608 (Supp. 1975); KY. REV. STAT. ANN. § 403.170 (1973); NEB. REV. STAT. ANN. § 42-822 (1974); N.H. REV. STAT. ANN. § 458.7-b (Supp. 1975); N.D. CENT. CODE. § 27-05.1-10 (Replacement Vol. 1974); ORE. REV. STAT. § 107.540 (1974); R.I. GEN. LAWS ANN. § 8-10-5 (1975); TEX. FAM. CODE § 3.54 (1975); WASH. REV. CODE ANN. § 26.09.030 (Supp. 1974).

51. *See, e.g.*, CALIF. CIV. CODE ANN. § 4514 (West Supp. 1976); COLO. REV. STAT. § 14-10-106 (1973); CONN. GEN. STAT. ANN. § 46-44 (1975); IDAHO CODE § 32-716 (Supp. 1975); IND. STAT. ANN. § 31-1-11.5-8 (Supp. 1976); KY. REV. STAT. ANN. § 403.170 (1973); MASS. ANN. LAWS ch. 208, § 1A (1976); MICH. STAT. ANN. § 25.89(6) (1974); WASH. REV. CODE ANN. § 26.09.030 (1969).

52. Bronstein, *The Question of Haitian and Dominican Divorces*, 166 N.Y.L.J., Sept. 21, 1971, at 4, col. 1. Bronstein notes that New York court calendars may result in a delay of two or three months in processing a divorce.

53. KAHN & KAHN, *supra* note 16, at 122.

\$500, but this figure fails to take into account travel, lodging, and incidental expenses.⁵⁴ These concurrent outlays considerably surpass those incurred in the former typical Mexican divorce.⁵⁵ When the total is calculated, the cost of dissolving a marriage in the Caribbean easily exceeds the typical expense of the American process. This total has been estimated at \$1,000,⁵⁶ and one observer has stated that it can easily exceed \$1,500.⁵⁷

E. AVOIDING PUBLICITY

Even in an amicable bilateral consent proceeding, the act of terminating one's marriage can be a very emotional and painful experience.⁵⁸ The parties may feel considerable relief in one respect, and yet suffer humiliation and disgrace in another. American no-fault reform has mitigated these side-effects somewhat. The unavoidable stigma to adults and embarrassment to children generated by findings of cruelty, desertion, or adultery have been eliminated. Still, a particular couple may prefer to refrain from publicizing the circumstances of the divorce in their community. The desire to avoid local publicity may be augmented in jurisdictions which require conciliation proceedings. Although such counseling is strictly private,

Any information the parties impart to the investigator would not be confidential. It *could not* be confidential because this is the information which must provide the judge with the "true facts" about the marital rift. These are the facts which must be included in a report to the judge and which become the basis, the major basis, of the court's decision to grant or withhold a divorce.

. . . .

Naturally the parties would be warned by their attorneys—and perhaps should be advised by the court—that, no matter how informal the setting of the interview with the investigator, any statement made to him may be communicated to the judge who determines the fate of their marriage.⁵⁹

Clearly, individuals who value privacy will favor a Caribbean divorce,

54. WHEELER, *supra* note 2, at 166.

55. Bronstein, *supra* note 52, at 4, col. 2.

56. *Id.*

57. KAHN & KAHN, *supra* note 16, at 153.

58. Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179, 191 (1968).

59. *Id.* at 199-200 [footnotes omitted].

as the entire matter can be processed far from the eyes and ears of neighbors, business associates, and the local media.

II

RECOGNITION AND VALIDITY

A. FORMAL RECOGNITION

The decision to grant or deny recognition to a divorce obtained in a foreign country hinges on a court's application of "comity" principles.⁶⁰ As defined by the United States Supreme Court:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.⁶¹

In essence, before a state will accord comity to a foreign divorce it must determine whether doing so would contravene its own public policy.⁶² Since few courts have definitively answered this question for Caribbean divorces, it is essential to examine the policies the fifty-three American jurisdictions have established toward Mexican divorce, and to ascertain whether the switch from Mexico to the Caribbean has necessitated changes in those positions.

Fifty-one United States jurisdictions refuse to grant comity to Mexican bilateral divorces.⁶³ The public policy of these dominions demands

60. *Commonwealth v. Doughty*, 187 Pa. Super. 499, 506, 144 A.2d 521, 525 (1958); *Warrender v. Warrender*, 79 N.J. Super. 114, 119, 190 A.2d 684, 687 (App. Div. 1963), *aff'd*, 42 N.J. 287, 195 A.2d 16 (1964); *Mexican Divorces: Are They Recognized in California?*, 4 CAL. W. L. REV. 341, 345 (1968).

61. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

62. *Kugler v. Haitian Tours, Inc.*, 120 N.J. Super. 260, 265, 293 A.2d 706, 709 (Ch. Div. 1972); *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 375, 130 N.E.2d 902, 903, 54 A.L.R.2d 1232, 1235 (1955); *Bergeron v. Bergeron*, 287 Mass. 524, 529, 192 N.E.2d 86, 89 (1934).

63. Annot., *supra* note 7, at 1439, and *Isle of Hispaniola*, *supra* note 2, at 206, cite New York to be the only jurisdiction conferring recognition to foreign divorces. However, in 1969, the Virgin Islands in *Perrin v. Perrin*, 408 F.2d 107 (3d Cir. 1969), adopted the New York approach:

Although we recognize that there is a divergence of view on this question among American jurisdictions, we hold, as did the Court of Appeals of New York in that case, that "A balanced public policy now requires that recognition of the bilateral Mexican divorce be given rather than withheld and such recognition as a matter of comity offends no public policy" of this Territory.

408 F.2d at 111 [footnote omitted].

that at least one of the parties be domiciled in the forum before the court can decree a dissolution.⁶⁴ The brief residency characteristic of Mexican divorces (sometimes as short as a few hours) creates no semblance of the necessary domicile. In the words of one court:

[M]exican divorces have been refused recognition They are viewed with scant regard for pretended jurisdiction because of public knowledge that they are customarily granted without bona fide residence or domicile.⁶⁵

The Supreme Judicial Court of Massachusetts has elucidated the underlying concerns of states which deny comity to foreign decrees:

To recognize the Mexican divorce as valid in the circumstances here disclosed would frustrate and make vain all State laws regulating and limiting divorce. By such recognition State control over the marriage relation would be destroyed.⁶⁶

Since the laws of Haiti and the Dominican Republic do not require domicile as a prerequisite for Americans seeking divorce,⁶⁷ Caribbean decrees will probably be as repugnant to the public policy of these states

64. See, e.g., *Bergeron v. Bergeron*, 287 Mass. 524, 529, 192 N.E.2d 86, 89 (1934): It is stated in Am. Law Inst. Restatement: Conflict of Laws, § 111, that "A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state." In Dicey's Conflict of Laws (5th ed.) 428, occurs this statement: "the Courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings for divorce." A considerable body of authority supports this view.

In *Ryder v. Ryder*, 2 Cal. App. 2d 426, 431, 37 P.2d 1069, 1070 (1934), the court remarked:

The general rule is that jurisdiction over the subject-matter of divorce rests upon domicile, or at least residence of one of the parties, and a decree of divorce rendered in a foreign jurisdiction may be impeached and denied recognition upon the ground that neither of the parties had such domicile or residence at the divorce forum notwithstanding the recitals in the decree.

65. *Commonwealth v. Doughty*, 187 Pa. Super. 499, 506, 144 A.2d 521, 525 (1958).

66. *Bergeron v. Bergeron*, 287 Mass. 524, 529, 192 N.E.2d 86, 89 (1934).

67. Forscher, *supra* note 8, at 4, col. 3. Article II of the new Haitian divorce code declares:

When a foreign plaintiff personally submits voluntarily to the Haitian jurisdiction and when a defendant shall have appointed a duly mandated representative, this voluntary [sic] submission of both parties to the Haitian Justice will give competence (jurisdiction) of the matter to the Haitian Court. In such cases, both parties will be dispensed of the formalities prescribed by the Decree of November 20th, 1970, on election of domicile

Law of June 28, 1971. No residency requirement exists for Dominican jurisdiction either. See note 8 *supra*.

as were their Mexican forerunners. New Jersey is one of the few states which has dealt directly with the issue of Caribbean dissolutions:

While I have been unable to find a reported case in New Jersey, or elsewhere for that matter, dealing with a Haitian divorce, I am satisfied that the kind of bilateral divorce contemplated by defendants will be accorded no greater validity in this State than was the Mexican divorce in *Warrender* The interest of the State is too great to warrant recognition of Haitian "quickie" divorces.⁶⁸

Two American jurisdictions adhere to the contrary position. Sometimes called the "New York view,"⁶⁹ the policy of recognizing Mexican divorces as valid has also been adopted by the Virgin Islands.⁷⁰ Unlike its sister states, New York does not require that foreign divorce-seekers be domiciliaries of the forum. In the landmark case of *Rosensteil v. Rosensteil*,⁷¹ the New York Court of Appeals noted that "thousands of persons" had relied on the courts of Mexico to dissolve their marriages,⁷² and declared that these one-day divorces were no more offensive to public policy than Nevada decrees available after six weeks' residency.⁷³

Caribbean divorces will undoubtedly be recognized as valid by the courts of these two minority jurisdictions. Although fewer citizens have relied upon the Caribbean fora than on the Mexican courts, the reasoning of the majority in *Rosensteil* is equally applicable: a one-day formality in Haiti or the Dominican Republic is no more artificial than the six-week Nevada decrees which are valid in every state of the union.

Because New York has liberalized its own divorce grounds since *Rosensteil*,⁷⁴ foreign decrees may be worthy of even firmer recognition. Although the concurring and dissenting justices in that case were not willing to take the radical approach pronounced by the court majority, both minority opinions cited and supported the earlier precedent of *Gould v. Gould*,⁷⁵ a case in which the New York Court of Appeals granted recognition to a French divorce in which neither party had a French domicile.⁷⁶ The Goulds, while not intending to relinquish their

68. *Kugler v. Haitian Tours, Inc.*, 120 N.J. Super. 260, 266, 293 A.2d 706, 709 (Ch. Div. 1972).

69. See Annot., *supra* note 7, at 1435; *Isle of Hispaniola*, *supra* note 2, at 206.

70. See note 63 *supra*.

71. 16 N.Y.2d 64, 209 N.E.2d 709 (1966).

72. *Id.* at 71, 209 N.E.2d at 711.

73. *Id.* at 73, 209 N.E.2d at 712.

74. At the time of the *Rosensteil* opinion, adultery was the only basis for divorce in New York. *Id.* at 77, 209 N.E.2d at 714. The Domestic Relations Law now recognizes five additional grounds. N.Y. DOM. REL. LAW § 170 (McKinney 1975).

75. 235 N.Y. 14, 138 N.E. 490 (1923).

76. *Id.*

New York domicile, had spent many years abroad.⁷⁷ However, the crucial reason behind the court's sympathy for the Goulds was more likely the fact that they had obtained their French divorce on a ground recognized by the law of New York (adultery).⁷⁸ It is certainly logical that as New York divorce grounds become more liberal and similar to foreign law, judges who sympathize with the *Rosensteil* minority will be more inclined to find that foreign decrees accord with public policy. One New York court has already held that the "mutual consent" nature of some of the state's new liberal grounds makes Dominican decrees all the more acceptable.⁷⁹ Likewise, should the New York legislature adopt irretrievable breakdown as a ground for dissolution (as some legal scholars predict),⁸⁰ then Haitian divorces will be regarded as valid even under the more conservative *Gould* rationale.

To date, New York's highest court has issued no decision on the validity of Caribbean decrees. However, the holdings of two lower courts suggest that these divorces will be recognized in the same fashion as their Mexican predecessors. The Supreme Court in *Kraham v. Kraham*⁸¹ ruled that *Rosensteil* demands that comity be extended to Haitian dissolutions.⁸² The Supreme Court in *Feinberg v. Feinberg*⁸³ found that *Rosensteil* now compels recognition of Dominican proceedings.⁸⁴

One potential objection to the New York approach merits attention at this point. Some recent commentators have expressed fear that Caribbean decrees may face rejection by the New York Court of Appeals as violations of § 5-311 of the New York General Obligations Law,⁸⁵ which declares:

A husband and wife cannot contract to alter or dissolve the marriage An agreement, . . . between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains

77. *Id.*

78. See Howe, *The Recognition of Foreign Divorce Decrees in New York State*, 40 COLUM. L. REV. 373, 376 (1940); 23 COLUM. L. REV. 782 (1923).

79. *Feinberg v. Feinberg*, 171 N.Y.L.J., May 30, 1974, at 20, col. 8 (Sup. Ct. 1974);

To the extent our conversion divorce under sections 170(5) and 170(6) of the Domestic Relations Law contains consensual elements, the more thoroughly consensual foreign nation decree is not offensive.

80. Foster & Freed, *Family Law*, 25 SYRACUSE L. REV. 401, 402 (1974).

81. 73 Misc. 2d 977, 342 N.Y.S.2d 943 (Sup. Ct. 1973).

82. *Id.*

83. 171 N.Y.L.J., May 30, 1974, at 20.

84. *Id.*

85. See *Isle of Hispaniola*, *supra* note 2, at 208; Forscher, *supra* note 11, at 4, col. 4.

an express provision requiring the dissolution of the marriage or provides for the procurement of grounds for divorce.⁸⁶

Analysis of the pertinent case law indicates that the General Obligations Law is *not* infringed by procuring Caribbean divorce decrees. Construing the similarly-worded predecessor to § 5-311,⁸⁷ New York courts have held that the statute was violated only when public policy was offended. As the Court of Appeals explained in *In re Rhinelander*:⁸⁸

It is no part of the public policy of this State to refuse recognition to divorce decrees of foreign states when rendered on the appearance of both parties, even when the parties go from this State to the foreign state for the purpose of obtaining the decree and do obtain it on grounds not recognized here We do have a statute nearly fifty years old, and expressing a prohibition much older, which lays down the rule that "a husband and wife cannot contract to alter or dissolve the marriage." (Domestic Relations Law, § 51.) This Court has never hesitated to enforce that statute and to strike down any agreement fairly within its intendment But going back as far as 1835 . . . we find no expression of public policy justifying the annulment of the agreement we are scrutinizing here.⁸⁹

Relying on *Rhinelander*, the lower court in *Rosensteil* held that obtaining a foreign divorce was not offensive to § 5-311.⁹⁰ In fact, as one court has concluded:

No case has been found which invalidated a Mexican divorce because the appearance upon which it was based was signed in violation of that section [emphasis added].⁹¹

Because Caribbean divorces do not violate public policy in New York, they should not be invalidated under § 5-311.

B. PRACTICAL RECOGNITION

Although only two American jurisdictions formally acknowledge foreign divorces, citizens of other states will continue to dissolve their marriages in the Caribbean. The courts of most jurisdictions will accord practical recognition to these decrees under equitable doctrines of estop-

86. N.Y. GEN. OBL. LAW § 5-311 (McKinney Supp. 1975) [hereinafter referred to as § 5-311].

87. N.Y. DOM. REL. LAW § 51 (McKinney 1957).

88. 290 N.Y. 31, 47 N.E.2d 681 (1943).

89. *Id.* at 36-37, 47 N.E.2d at 684.

90. *Rosensteil v. Rosensteil*, 21 App. Div. 2d 635, 638, 253 N.Y.S.2d 206, 209 (1964), *aff'd*, 16 N.Y.2d 64, 209 N.E. 2d 709 (1966).

91. *Harges v. Harges*, 46 Misc. 2d 994, 1001, 261 N.Y.S.2d 713, 721 (Sup. Ct. 1965).

pel, unclean hands, or laches.⁹² Recognition is effected in these situations not through declarations of validity, but rather by preventing opponents of divorces from asserting their invalidity.⁹³

The problem for those who seek divorce abroad is that such equitable relief is not predictable. Whether equity will grant recognition depends on the nuances of the individual case and the discretion of the particular court. Dealing first with estoppel and unclean hands,⁹⁴

[i]t is now settled that in deciding whether estoppel or unclean hands will apply in a particular set of facts the court will appraise the "total situation" and will weigh the equities of the parties and others affected, as well as the interests of the State, with flexibility.⁹⁵

As another court has said, "no particular set of facts is necessary to invoke an equitable estoppel"⁹⁶ Often the party who initiates the foreign divorce will be estopped from denying its validity.⁹⁷ In other jurisdictions the party who procures the decree will be allowed to challenge it later on the grounds that the foreign dissolution is void *ab initio*.⁹⁸ Still other courts hold that an individual who aids the plaintiff in obtaining the divorce will be prevented from attacking it.⁹⁹ A number

92. Annot., 13 A.L.R.3d 1419, 1452 (1967).

93. *Id.*

94. Warrender v. Warrender, 79 N.J.Super. 114, 120, 190 A.2d 684, 687 (App. Div. 1963) explains:

Although estoppel *in pais* (equitable estoppel) and unclean hands are distinct concepts, the terms estoppel and unclean hands have often been used interchangeably.

95. *Id.* at 121, 190 A.2d at 688. The court opinion elucidates further:

Among the facts and circumstances which are or may be material factors in such a controversy are whether the divorce decree is void or voidable; whether it was obtained by the present complainant, or was participated in by him; whether it was obtained with or without collusion or fraud upon the court, or fraud or duress upon the adverse party; whether the other spouse has since died, or married again; whether there are children by such second marriage; whether the complainant has accepted the benefits of the divorce, such as alimony, or by marrying again; whether or not the other spouse participated in the divorce, or acquiesced; whether complainant has been guilty of laches or undue delay; what the nature of the new suit is, and the motive or object of complainant in bringing it; whether the complainant is an original party to the divorce action, or a child, or heir or representative, and the like. *Id.* at 121-22, 190 A.2d at 687-88.

96. Estate of Shank, 154 Cal. App. 2d 808, 811, 316 P.2d 710, 711 (4th Dist. 1957).

97. See Diehl v. United States, 438 F.2d 705 (5th Cir. 1971); Smith v. Smith, 36 F. Supp. 412 (D.D.C. 1940).

98. See, e.g., Golden v. Golden, 41 N.M. 356, 68 P.2d 928 (1937), which ruled Mexican decrees to be totally void, subject to collateral attack in any jurisdiction.

99. See, e.g., Harlan v. Harlan, 70 Cal. App. 2d 657, 161 P.2d 490 (2d Dist. 1945). A wife's suitor who aided her in procuring a foreign divorce, and paid her attorney's fees and

of courts prohibit one who remarries in knowledge of and reliance on the foreign decree from later challenging it.¹⁰⁰ Some courts have applied the same principle where the party does not remarry but establishes a meretricious relationship after the foreign judgment.¹⁰¹ On occasion courts compare the relative misconduct of the couple, and refrain from estopping parties in equal fault,¹⁰² or the party in lesser fault,¹⁰³ from attacking the decree.

Whether a state will validate a foreign divorce through laches is similarly a complex question. The court's equitable disposition after the passage of time is influenced by the conduct and circumstances of the parties since the procurement of the decree; no precise time can be determined as to when a divorced party is protected by laches. In the Florida case of *Pawley v. Pawley*,¹⁰⁴ a three-year period of silence activated the doctrine of laches and prevented a wife from contesting her husband's Cuban divorce.¹⁰⁵ By contrast, in the Wisconsin case of *Estate of Gibson*,¹⁰⁶ laches did not prevent a wife from successfully challenging her husband's Mexican decree after sixteen years of inaction.¹⁰⁷

Caribbean divorce-seekers domiciled in the majority rule jurisdictions can glean one message from the relevant precedents: *proceed at your own risk*. The courts will not formally recognize the foreign dissolution, and yet the facts of the particular case may lend themselves to practical recognition through application of equitable principles. When equitable doctrines are not adaptable, individuals can still seek out the Caribbean forum in the hope that their decrees will never be challenged.

CONCLUSION

The variables analyzed in this study indicate that divorce in the Car-

expenses, could not attack the Mexican decree in an action to annul his subsequent marriage to her.

100. See, e.g., *Clagett v. King*, 308 A.2d 245 (D.C. Cir. 1973); *Schotte v. Schotte*, 203 Cal. App. 2d 28, 21 Cal. Rptr. 220 (1962).

101. See, e.g., *Estate of Shank*, 154 Cal. App. 2d 808, 316 P.2d 710 (4th Dist. 1957), where a man whose wife had divorced him in Mexico was estopped from invalidating the decree after he established a meretricious relationship with his housekeeper.

102. See, e.g., *Cross v. Cross*, 94 Ariz. 28, 30, 381 P.2d 573, 574 (1963), where no estoppel was declared since "both parties were in pari delicto in procuring the Mexican divorce."

103. The estoppel claim was denied the husband in *Warrender v. Warrender*, 79 N.J. Super. 114, 190 A.2d 684 (App. Div. 1963), *aff'd*, 42 N.J. 287, 195 A.2d 16 (1964), where the wife obtained a Mexican divorce, but where he had arranged and financed the entire affair.

104. 46 So.2d 464 (Fla. 1950).

105. *Id.*

106. 7 Wis. 2d 506, 96 N.W.2d 859 (1958).

107. *Id.*

ibbean has some advantages and disadvantages for United States citizens. Haitian grounds are equivalent to those established in thirty-two American jurisdictions; Dominican grounds are somewhat more liberal. For residents of the twenty-one more conservative jurisdictions, Caribbean dissolutions are clearly appealing as regards grounds for divorce. Furthermore, the evidentiary showing demanded of the parties is slightly less in Haiti and substantially less in the Dominican Republic than in the United States. Yet, many American divorce hearings tend to be pro-forma, and failure to give strict adherence to the evidentiary requirements reduces this Caribbean advantage. Haitian and Dominican divorces are also more expensive to obtain than most American dissolutions. They nonetheless offer the advantages of more rapid processing and avoidance by the parties of unwanted publicity.

New York and the Virgin Islands will probably accord validity to Caribbean decrees just as they respect those of sister states. Citizens of the remaining jurisdictions must proceed at their own risk. While Caribbean divorces will not be formally recognized in these latter dominions, equitable principles *may* serve to protect the foreign decree, or, alternatively, the proceeding may never be challenged.

In the aggregate, whether Caribbean-style dissolution is preferable to divorce at home depends on the unique situation of the parties and the particular circumstances of their case. The enactment of no-fault legislation in the United States has clearly met the needs of thousands who, a decade ago, would have had to terminate their marriages abroad. Yet, the institution of the Caribbean divorce has not lost all of its serviceability, and it is likely to be utilized by American citizens for years to come.

James A. Fulton